Filed 7/10/19 Kahn v. Rubin CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JUSTIN KAHN et al., Plaintiffs and Respondents, v. MARK RUBIN et al., Defendants and Appellants.	B284167 (Los Angeles County Super. Ct. No. BC651255)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed with directions.

Shaver, Korff & Castronovo, Thomas W. Saver and Michael J. O'Neill for Defendant and Appellant Mark Rubin.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, Kenneth C. Feldman and Larissa G. Nefulda for Defendants and Appellants Schreiber & Schreiber, Inc., Edwin Schreiber and Eric Schreiber.

Peter M. Kunstler for Plaintiffs and Respondents.

Mark Rubin (Rubin) sued Justin Kahn (Kahn), Steven Granitz (Granitz), and Noozcard, Inc. based on allegations they had formed a partnership.[1] Schreiber & Schreiber and its attorneys Edwin and Eric Schreiber[2] (collectively, Schreiber) represented Rubin in that lawsuit, in which Noozcard prevailed. Noozcard then sued Rubin and Schreiber for malicious prosecution. Rubin and Schreiber each made a special motion to strike the complaint. The trial court denied the motions. (Code Civ. Proc., § 425.16).[3] Rubin and Schreiber now appeal from the order denying their motions. Because we conclude there is no showing that Rubin and Schreiber brought and maintained the underlying action with malice, we reverse the order.

BACKGROUND

I. Rubin, Granitz, and Kahn

Rubin is a marketing and sales executive in the entertainment industry. Granitz has worked in photography and social media. The two men met in 2008 and, over the years, talked about doing business together. In 2012, Granitz suggested Rubin meet his friend, Kahn, who also had a background in photography and photojournalism. The three men met and discussed business ideas and forming a partnership to develop those ideas. Eventually, they came up with the idea of a business

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[1] We refer to Kahn, Granitz, and Noozcard, Inc. collectively as Noozcard.

[2] We refer to the Schreibers by their first names for the sake of clarity, intending no disrespect.

[3] All further statutory references are to the Code of Civil Procedure.

involving electronic trading cards or digital e-cards which would be called Celeb-Cast.[4] The cards would have front and back sides with images, videos, and streams about the user's favorite celebrity, athlete or famous person. The cards would be a single source for all information about that person, with real-time updates. Getty Images and Granitz would provide the photographic library.

However, in 2013, Kahn and Granitz—without Rubin—formed Noozcard, Inc. They then—again without Rubin—launched newzcard,[5] "a revolutionary new photosharing platform that for the first time gives everyone the ability to LEGALLY share millions of images of celebrities, athletes, fashion, and newsmakers from the world's top photographers and photojournalists on blogs and social media. Instead of just publishing the one or two images selected by a photo editor, [*]newzcard makes the photographer's whole take available. Instead of experiencing only a single moment from an event, game, or story, you now have access to the whole thing, every shot, every angle."

When Rubin found out about newzcard, he told Granitz and Kahn that he was a part of the team that developed the idea behind it and that the three of them were "equal partners" and that he had put a lot of work into the concept. Rubin asked that they formalize their ownership interests and responsibilities. Kahn responded that they never had a partnership.

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[4] According to Kahn, he has owned the name Celeb-Cast since 2008.

[5] Noozcard, Inc. is the company, and newzcard is its product.

The underlying action followed.

II. The underlying action

In 2014, Rubin, represented by Schreiber, sued Noozcard for (1) breach of partnership agreement seeking specific performance, injunctive relief and damages; (2) breach of fiduciary duty; (3) intentional misrepresentation-fraud; (4) negligent misrepresentation; and (5) declaratory relief. Rubin alleged that he, Granitz, and Kahn formed a partly oral and partly written equal partnership to develop the digital e-cards. However, Granitz and Kahn actively and fraudulently concealed from Rubin that they were developing Noozcard, Inc., which had a business model virtually identical to Celeb-Cast. Rubin sought specific performance and damages of not less than draws taken by Granitz and Kahn, i.e., not less than $100,000.

The matter went to a bench trial before the Honorable Gerald Rosenberg. Following Rubin's case-in-chief, the trial court granted Noozcard's motion for judgment (§ 631.8). The court found that no partnership agreement existed between the parties. "While the parties met and discussed the possibility of furthering [Celeb-Cast], . . . those conversations never arose to the level of an agreement for a 3-way partnership between" Rubin, Granitz, and Kahn. Nor did a Celeb-Cast business outline prepared by Rubin constitute an acceptance of any offer. Having determined that no partnership existed, the trial court found no basis for the remaining causes of action. Although the concepts for Celeb-Cast and newzcard were "similar" in that they pertain to celebrity or newsworthy information, they differed in many ways. Rubin thus did not prove a proprietary interest in Celeb-Cast or Noozcard, Inc.

III. The malicious prosecution action

After obtaining a favorable termination in the underlying action, Noozcard sued Rubin and Schreiber for malicious prosecution. Noozcard alleged that Rubin did not have probable cause to bring the underlying action because no partnership was ever formed, Noozcard, Inc.'s business was materially different from the one Rubin claimed they formed, no writing substantiated the partnership, Rubin had nothing of value to contribute to any alleged partnership, and Rubin should have known that neither Kahn nor Granitz received a distribution from Noozcard, Inc. because it was a startup.

A. *The special motions to strike*

Schreiber and Rubin filed separate special motions to strike the complaint, both of which argued that Noozcard could not establish the elements of a malicious prosecution, i.e., lack of probable cause and malice. Both motions were based on the following evidence.

1. Rubin's declaration

According to Rubin, he and Granitz spoke numerous times about going into business together. In early 2012, Granitz suggested they meet Kahn, whom Rubin had never met, to brainstorm ideas. Granitz said they would be equal partners if they came up with an idea. Rubin and Granitz first met with Kahn in 2012 at Jerry's Deli, where they agreed that any idea they developed would be shared equally. After months of meetings, they developed an electronic trading card idea. Granitz wanted each partner to put in $30,000 but they agreed to wait until they confirmed that Getty Images wanted to participate in the project.

On June 11, 2012, the three men met to discuss pitching the idea to Getty Images. Rubin was given the responsibility of preparing a business outline. Kahn was to confirm with his developers in Israel that the electronic card could have front and back sides. Granitz was to contact an attorney about preparing the partnership agreement. In fact, Granitz had already sent an email to an attorney asking how much it would cost to "put together a partnership agreement for [him] and two other partners[.] [¶] It would be for a digital [m]obil app." The attorney responded that this was outside his expertise but recommended someone else. Granitz told Kahn that he was going to contact the recommended attorney. On his end, Rubin prepared and circulated his business outline later that month but received no substantive response about it.

Instead, Granitz eventually told Rubin that he and Kahn did not want to pursue the cards. In response, Rubin emailed Granitz and Kahn on August 3, 2012: Rubin "spoke to [Granitz] and underst[oo]d that this idea has been abandoned (at least [his] involvement)." Rubin explained that he had always been willing to invest and to commit to the project. However, Rubin added, "I guess for you both to decide amongst yourselves that this idea/relationship should be abandoned and not even include me should not be a surprise to me."

Even so, the parties continued to communicate. In September or October 2012, Granitz told Rubin that nothing was happening with the business idea but maybe they could revisit it later. Then, on December 19, 2012, Granitz told Rubin in an email that he had talked to Getty Images about their "idea and they loved it. [Kahn] and [Granitz] were going to call [Rubin] and see if [they] can start it again due to [G]etty's interest. Now the

only issue is this new rule by Instagram. If they are trying to own anything that is uploaded we a[re] screwed. But let's see what happens." Later that month, Granitz told Rubin the idea was on hold. Thereafter, in 2013, when Rubin tried to raise Celeb-Cast, Granitz said that nothing had changed and the idea was dead for now.

Unbeknownst to Rubin, Granitz and Kahn incorporated Noozcard, Inc. in August 2013, having received about $1 million in venture funding. Rubin found out about Noozcard, Inc. in October 2014.

Rubin submitted handwritten notes he took of his meetings with Granitz and Kahn. Rubin's notes of the kickoff meeting indicated that Granitz or Kahn would be the chief executive officer, Rubin would be managing partner, and they would be "[a]ll [e]qual [p]artners." His notes from the second meeting indicated that the three men discussed ideas for entertainment-related apps, although they discussed other ideas. One note indicated that Granitz would check with an attorney "so [they could] [¶] set everything up for [the] company."

2. Attorney declarations

Attorney Jonathan Blinderman declared that Rubin had approached him about the case against Noozcard. After discussing the case with Rubin and reviewing documents, Blinderman thought it had merit, but his then firm would not allow him to take it on contingent basis.

Schreiber eventually took the case. Before filing the complaint, Eric spoke to Rubin and reviewed Rubin's handwritten notes, business outline, and communications between the parties. Eric also reviewed Rubin's phone records, which confirmed that Rubin and Granitz spoke about 67 times.

Eric was familiar with this type of litigation, as he and his firm were litigating another case involving a partner who also claimed improper exclusion from a partnership. He detailed the work he performed on the case, including the professional courtesies he extended to opposing counsel, to counter any imputation of bad-faith litigation conduct. Schreiber never made a settlement demand on Rubin's behalf.

Edwin, the more senior attorney at the firm, became involved in the case when it became clear it was going to trial. At all times he too thought the case had merit and that Rubin could establish the existence of a partnership. Edwin denied ill will toward Granitz and Kahn. In fact, he had never met them prior to the litigation.

B. *Noozcard's opposition*

Noozcard submitted the following evidence in opposition to the motions.

1. Granitz's declaration

Granitz and Rubin met in 2008 and bonded over a mutual interest in vintage cars. In about 2012, Granitz suggested they talk about a possible business venture with Kahn, whom Rubin had never met. The three men had only three in-person meetings. Otherwise, all communications were between Granitz and Rubin. They talked about using the name Celeb-Cast for a trading card concept. When Rubin submitted what Granitz and Kahn considered to be an amateurish business outline, they realized they could not enter into any venture with him.

Granitz did send the December 19, 2012 email to Rubin referring to "our idea." But Granitz was referring to his and Kahn's idea and not to a partnership. Granitz never represented

to Rubin that he (Granitz) could speak for Kahn. From the end of 2012 to 2014, Granitz did not hear from Rubin. During that time, Granitz and Kahn developed newzcard, a venue for sharing news and photos from photojournalists in real time. Other than a modest salary, neither Granitz nor Kahn took any distribution from Noozcard, Inc. Instead, the lawsuit scared away investors and caused Grantiz and Kahn to suffer major financial losses.

2. Kahn's declaration

Kahn first met Rubin in April 2012, and only had three in-person meetings with him in the span of one month. Kahn never made any representation or promise to Rubin, never agreed to enter into a business venture with him, much less share one-third of the profits from any such venture, and he never authorized Granitz to enter into such a venture. Rather, the men merely met to ascertain if there were "any possible synergies." Over the course of their relationship, Kahn sent Rubin one email informing Rubin he was out of town and one letter in response to Rubin's contention he was a partner in Noozcard, Inc.

3. Baruch Cohen's declaration

Attorney Baruch Cohen represented Granitz and Kahn in the underlying action. As early as June 2015, Cohen turned over financial documents showing that the company owed money and had no profits or assets. After a case management conference in October 2015, Cohen told Eric that Noozcard, Inc. had no profits, so even if Rubin won, his lost profits would be "1/3rd of zero." When Cohen explained that Rubin could not prove damages, Eric acknowledged the issue and said, "I guess I'll have to retain an expert as to projections of what potential income a company like

Noozcard[, Inc.] could be generating." At the trial on the underlying action, Rubin did not call any experts.

C. *Trial court's ruling*

The trial court denied both motions.[6] This appeal followed.

DISCUSSION

I. Anti-SLAPP motions

The anti-SLAPP statute "provides a procedure for the early dismissal of what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights."[7] (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

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[6] The trial court ruled on the parties' evidentiary objections and those rulings are not at issue.

[7] Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

"In evaluating an anti-SLAPP motion, the trial court first determines whether the [moving] defendant has made a threshold showing that the challenged . . . action arises from protected activity," that is, activity in furtherance of the rights of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; § 425.16, subd. (e).) If so, the burden shifts to the plaintiff to demonstrate a probability of prevailing. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820.) We review an order granting or denying a special motion to strike de novo. (*Id.* at p. 820.) We consider the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We examine the complaint in a fair and commonsense manner and we broadly construe the anti-SLAPP statute. (See *ibid.*) "[W]e neither 'weigh credibility [nor] compare the weight of the evidence.' " (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Here, there is no dispute that the malicious prosecution action arises from protected activity. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735.) We therefore proceed to the second prong, whether Noozcard demonstrated a probability of prevailing on the malicious prosecution claim.

II. Elements of a malicious prosecution

Malicious prosecution is a disfavored action. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493.) To establish a cause of action for malicious prosecution, a plaintiff must plead and prove that the prior action (1) was commenced by or at the defendant's direction and was pursued to a legal

termination in plaintiff's favor;[8] (2) was brought without probable cause; and (3) was initiated with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

"The question of probable cause is 'whether, as an objective matter, the prior action was legally tenable or not.' " (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 292.) "Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed," and therefore the standard of probable cause to bring a civil suit is equivalent to that for determining the frivolousness of an appeal. (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047.) This lenient standard for bringing a civil action reflects the public policy of avoiding chilling novel or debatable legal claims, as attorneys and litigants have a right to present issues that are arguably correct, even if it is extremely unlikely they will win. (*Ibid.*) Thus, only those actions that " ' ' "any reasonable attorney would agree [are] totally and completely without merit" ' may form the basis for a malicious prosecution suit.' " (*Id.* at p. 1048; *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743, fn. 13; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 824.) "Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious." (*Wilson*, at p. 822.)

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[8] There is no dispute Noozcard satisfied this element.

"The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874.) Malice " 'reflects the core function of the tort, which is to secure compensation for harm inflicted by misusing the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement.' " (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 466–467.) "Malice ' "may range anywhere from open hostility to indifference" '; it is not limited to ' "ill will toward plaintiff but exists when the proceedings are [prosecuted] primarily for an improper purpose." ' " (*Id.* at p. 466.) "Improper purposes can be established in cases in which, for instance (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224.) "Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218 (*HMS Capital*).) Malice can also be inferred when a party continues to prosecute an action after becoming aware it lacks probable cause. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970; *Daniels*, at p. 226.)

However, a lack of probable cause is by itself insufficient to establish malice. (*HMS Capital*, *supra*, 118 Cal.App.4th at

p. 218; *Downey Venture v. LMI Ins. Co.*, *supra*, 66 Cal.App.4th at p. 498, fn. 29.) Although the absence of probable cause is a factor that may be considered to determine the existence of malice, that factor must be supplemented by other, additional evidence. (*Daniels v. Robbins*, *supra*, 182 Cal.App.4th at p. 225; *Downey Venture*, at pp. 498–499 & fn. 29.)

We proceed directly to the malice element, and because, as we next explain, that element has not been established, we do not reach the element of probable cause.

III. Malice

We now discuss what we discern are Noozcard's essential reasons why Rubin and Schreiber prosecuted the underlying action with malice and conclude that they did not initiate and continue the underlying action with malice.

A. *Lack of probable cause*

Noozcard acknowledges that lack of probable cause is insufficient by itself to establish malice. (*HMS Capital*, *supra*, 118 Cal.App.4th at p. 218.) Yet, Noozcard relies on the alleged absence of probable cause to establish malice. Noozcard thus argues that Rubin and Schreiber knew before filing the underlying action that there was no evidence to support it, i.e., an inference of malice arises from the supposed lack of probable cause. No such inference arises. Rather, to some extent, the tenability of Rubin's claim that the parties formed a partnership was a he said, she said scenario. Rubin said the parties agreed to an equal partnership. Granitz and Kahn denied there was such an agreement. Given that the formation of a partnership may be oral (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445), Rubin's testimony was itself evidence there was in fact a partnership (see

Evid. Code, § 411 [testimony of single witness sufficient to establish fact]).

But Rubin's testimony was not the only evidence the parties entered into a partnership. His contemporaneous notes confirmed that the men discussed an equal partnership. Also, Granitz contacted an attorney about preparing a partnership agreement "for myself and two other partners," and Granitz told Kahn that he would be contacting an attorney. The men also had meetings, albeit few. Moreover, there is no dispute that the parties discussed the idea of a digital card called Celeb-Cast. And, although Noozcard asserts that Judge Rosenberg found in the underlying action that newzcard was different from Celeb-Cast, what he actually found was that they "are similar in that they contain celebrity or newsworthy information. However, they differ in many ways." Thus, there was some similarity between the two concepts.

No inference of malice arises from the alleged absence of probable cause, because there was some evidence of a partnership.

B. *Failure to investigate*

Noozcard argues that Rubin and Schreiber failed to investigate the claim before the underlying action. However, Rubin consulted two attorneys—Blinderman and Schreiber—before filing the underlying action. Both advised him that the case had merit. A client's reliance in good faith on the advice of counsel and after a full disclosure of facts customarily establishes probable cause. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556.) If such reliance establishes probable cause, it is hard to see how Rubin's consultation with attorneys establishes malice.

Similarly, before filing the underlying action, Eric reviewed, for example, Rubin's handwritten notes and the business outline, talked to his client, and did legal research. Even if Schreiber was negligent in conducting factual research, that by itself is insufficient to show malice. (See *Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1463, 1467–1468.)

C. *Failure to document the partnership*

To show that Rubin fabricated his claim, and hence acted with malice, Noozcard relies on Rubin's failure to document the partnership or to reference it in correspondence. However, as we have said, a partnership may be oral or implied from the parties' conduct. The alleged absence of documentation is therefore not evidence of malice. And, to the extent someone was supposed to prepare a partnership agreement, there is evidence it was Granitz's responsibility. The parties divided up responsibilities, with Granitz given the task of finding an attorney. To that end, Granitz emailed an attorney about preparing an agreement. More to the point, Granitz's email constitutes the documentation Noozcard claims is absent. That email asks an attorney about preparing a partnership agreement "for myself and two other partners."

Although Rubin himself did not use the word partnership in his correspondence, he did refer to "the venture" and to "the investment" in an August 3, 2012 email, thereby evidencing his belief the parties had some kind of business relationship. That Rubin believed the three men had a partnership is also inferable from his business outline. In that outline, he wrote that they should designate a chief financial officer and general counsel to show "we are an organized entity, not just three guys with a wild idea."

Hence, documents exist from which a trier of fact could infer the men entered into a partnership.

D. *Failure to appoint experts and to prove damages*

Noozcard asserts that Rubin and Schreiber's failure to designate or to present an expert on damages also evidences malice. Noozcard relies on attorney Cohen's declaration that he told Eric that Noozcard, Inc. was not making money and on a July 2015 balance sheet showing that the company was not generating profits. Thus, the basic argument is Rubin could not prove damages because Noozcard, Inc. was not worth anything. (See generally *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [speculative or " 'merely possible' " damages not awardable].)

However, Rubin was suing not just for monetary damages but for specific performance of the alleged partnership agreement (i.e., a one-third interest in Noozcard, Inc.) and for declaratory relief. Moreover, Rubin did not sue just Noozcard, Inc. He sued Kahn and Granitz. Therefore, that Noozcard, Inc., was not generating profits at the time of trial did not mean it would never generate profits or that damages could not be recovered from Kahn and Granitz. On that last point, and despite Noozcard's claim that the company was not realizing a profit and that Kahn and Granitz did not take a distribution from the company, they did receive what Granitz called a "modest salary" and one million in venture funding. Therefore, there was a basis for Rubin to believe that Noozcard had generated some profit.

Noozcard also argues that Rubin admitted at his deposition that he did not suffer any damages. What Rubin said was he did not suffer "financial loss" as a result of a misrepresentation. He did not have a dollar amount as to how much he'd been damaged because he did not know Noozcard, Inc.'s value or the total

investments it may have received. Rubin made no admission about damages showing that he intended to proceed with his case although he knew he was not damaged.

E. *Kahn's 2014 letters*

Next, Noozcard cites Rubin and Schreiber's failure to respond to Kahn's 2014 cease and desist letter as evidence of malice.[9] In that letter, Kahn explained why, in his view, Rubin had no claim against Noozcard. That is, their meeting in May 2012 was merely a brainstorming session, and at no time did they discuss what the actual business would be, how it would be structured, and what would be their individual roles. They did talk about putting in seed money, but Rubin was not keen on that idea. While Kahn and Granitz had extensive experience in photo distribution and in creating social applications, Rubin brought nothing to the table. Moreover, the application Kahn and Granitz had discussed with Rubin was not the same as newzcard. In conclusion, Kahn warned of the consequences should Rubin pursue the matter.

This letter is just another way of saying that the underlying action lacked probable cause. Rubin and Schreiber's refusal to respond to it does not establish malice. To the contrary, such letters and warnings as to the consequences of proceeding with a certain action are typical during the course of litigation. (See, e.g., *Roger Cleveland Golf Co.* (2014) 225 Cal.App.4th 660, 688.) And, it could be malpractice for an

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[9] The record contains two almost identical versions of a letter from Kahn to Rubin, one dated October 28, 2014 and one dated November 12, 2014, which was the day the complaint was signed.

attorney to drop a lawsuit merely because opposing counsel asserts the action is baseless. (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1272, fn. 5.) In no way does Rubin's and Schreiber's failure to respond to that letter evidence malice.

F. *Rubin's handwritten notes*

Noozcard suggests that Rubin, with Schreiber's knowledge, fabricated Rubin's handwritten notes. There is no showing that the trial court in the underlying action found those notes to be fraudulent or that the trial court in this malicious prosecution action found them to be so. In fact, the trial court below overruled objections to the notes. Hence, they are not evidence of malice.

DISPOSITION

The order is reversed. The trial court is directed to grant the special motions to strike and to enter judgment for Mark Rubin, Schreiber & Schreiber, Eric Schreiber, and Edwin Schreiber. Mark Rubin, Schreiber & Schreiber, Eric Schreiber, and Edwin Schreiber are awarded their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J. LAVIN, J.